UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF ADMINISTRATIVE LAW JUDGES SAN FRANCISCO BRANCH OFFICE

CHINESE DAILY NEWS

and	Cases	21-CA-36178
		21-CA-36181
		21-CA-36630
		21-CA-36632
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO		21-CA-36635
		21-CA-36919
		21-CA-36920
		21-CA-36981
		21-CA-37114

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Charging Party, Washington, D.C.

DECISION

Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Los Angeles, California on October 1 through 4, 2007 upon an Amended Consolidated Complaint (the Complaint) issued April 18, 2006 by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Communications Workers of America, AFL-CIO (the Union.) The Complaint, as amended, alleges Chinese Daily News (the Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

¹ In her post-hearing brief, Counsel for the General Counsel noted that unfair labor practice charges alleging the conduct described in Complaint paragraphs 9 and 10 were previously dismissed by the Region, and she withdrew that portion of Complaint paragraph 11 alleging that the Respondent directed an employee to cease talking about the hiring of part-time drivers.

Issues

- 1. Did Respondent independently violate Section 8(a)(1) of the Act by the following acts: on February 9, 2004 directing an employee not to talk about employee overtime issues; on June 14, June 28, July 26, and August 24, 2005 respectively, interrogating employees in the course of deposing them.
- 2. Did Respondent violate Section 8(a)(3) and (1) of the Act by the following acts: on and after January 29, 2004, promulgating and maintaining a dress code prohibiting the wearing of union insignia and promulgating and maintaining an overly broad nosolicitation/distribution rule; in late June or early July 2004, refusing to assign employee Shieh-Sheng Wei certain shift rotations and shift assignments, resulting in loss of overtime pay; and on August 17, 2004, issuing a written warning to employee Shieh-Sheng Wei.

On the entire record,² including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following

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Findings of Facts

I. Jurisdiction

At all relevant times, the Respondent, a California corporation, with facilities located at 1588 Corporate Center Drive, Monterey Park, California and 1230 Monterey Pass Road, Monterey Park, California, has been engaged in the business of publishing and distributing newspapers and selling books.³ During the 12-month period ending February 16, 2006, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross annual revenues in excess of \$200,000. In addition, the Respondent held membership in or subscribed to various nationally syndicated features, and advertised nationally sold products. During the same time period, Respondent purchased and received goods valued in excess of \$50,000, which goods were shipped directly to Respondent's Southern California facilities from points located outside of the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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² Counsel for the General Counsel's unopposed post hearing motion to correct the transcript is granted. The motion and corrections are received as ALJ exhibit 1.

³ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, uncontroverted testimony, and findings of fact in the decision of Administrative Law Judge, Clifford H. Anderson, regarding the parties herein, issued on February 25, 2005 and affirmed, as modified, by the Board at *Chinese Daily News*, 346 NLRB No. 81 (2006).

II. Background

The Respondent is a major Chinese-language daily newspaper published in Southern California. It is part of a multi-national family of Chinese language newspapers with the primary enterprise being the Taipei based United Daily News. The Respondent utilizes reporters and various news services to acquire news and then uses its own staff to prepare its newspaper pages and to print, bundle, and distribute copies of its paper to retail distribution points. Essentially all of the Respondent's employees and managers speak Chinese as their first language. All employee witnesses testified in Chinese, and various documents introduced at the hearing were written in Chinese, necessitating oral and written translation.

At relevant times, the following individuals served in the following positions as supervisors and agents of the Respondent:

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Ming Sheng Su (President Su)

Bo Li (Mr. Li)

Ren-Shiun Wing (Group Leader Wing)

President

Assistant Business Manager

Group Leader

The Respondent's packing department handles its newspaper bundling and distribution functions. Assisted by Deputy Group Leader Ching Hwa Kao (Deputy Group Leader Kao), Group Leader Wing supervised the packing department at all relevant times. Four to six full time and part time packing employees operated two bundling machines.

25 Consequent to a representation petition filed by the Union on October 26, 2000,⁴ the Board conducted an election in a wall-to-wall unit of the Respondent's employees on March 19, 2001, in which a majority of the votes was cast for the Union. Four years later, the Board overturned the election results based on the Respondent's objection to supervisory solicitation of union cards. *Chinese Daily News*, 344 NLRB 1071 (2005). On December 22, 2005, the Union lost the rerun election to which no objections were filed.

On April 17, 2006, the Board issued a Decision and Order, affirming in part the February 25, 2005 decision of Administrative Law Judge, Clifford H. Anderson. *Chinese Daily News*, 346 NLRB No. 81 (2006), enfd 224 Fed App 6 (D.C. Cir. 2007). The Board found, inter alia, that in 2001 the Respondent had committed numerous violations of the Act, including threats, interrogation, distribution of a memo prohibiting employees from discussing union matters, issuance of a warning letter to employee Lien-yi (Lynne) Wang (Ms. Wang) for her remarks at a union rally, and an increase in Ms. Wang's beat assignments after she led a reporters' protest against the Respondent's proposed beat changes.

Throughout and following the above-described proceedings, the Union has maintained an ongoing post election campaign to retain employee support for the Union, regularly communicating to employees, holding rallies and generally encouraging union activism.

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⁴ Case 21-RC-20280.

III. Alleged Unfair Labor Practices

A. Alleged Promulgation and Maintenance of Overbroad Solicitation/Distribution Rule and Discriminatory Dress Code

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On December 12, 2003, the Respondent hosted a year end buffet dinner for all employees and management on the facility's fourth floor in recognition of a visit from a top management official from Taipei. Reporter Ms. Wang, an active and known union supporter who had testified and assisted the Union in the prior representation and unfair labor practice proceedings, attended. On that occasion, Ms. Wang wore a navy blue vest with a union logo on the upper left chest and on the back in Chinese the words, "Chinese Daily News Union" (the union vest). About nine other employees, including sales representative, Jui Jung Pao, driver, Jeffrey Sun (Mr. Sun), and part-time packing employee Shieh Sheng Wei (Mr. Wei) also wore the union vests. Mr. Wei was a prominent union supporter, participating in union demonstrations at the company and wearing a red tee shirt with the union logo and/or the union vest to work several times a week during December 2003 and January 2004.⁵

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At the December 12, 2003 party, classified advertising supervisor, Karen Lee (Ms. Lee), commented on Ms. Wang's attire, saying, "What are you wearing? We don't have a union."

Ms. Wang, said, "Yes, we have a union; don't you know that?"

Mr. Wei's supervisor, Group Leader Wing, commented on Mr. Wei's attire, saying that since the union shirts were free, he, too, would have enough courage to wear them.⁶

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Two days later, Ms. Wang again wore the union vest to a company welfare committee meeting attended by the Human Resource Manager, Steven Gao (HR Manager Gao), General Manager, David Liu, and Ms. Lee. Ms. Lee criticized Ms. Wang for wearing the union vest. Ms. Wang replied that the company had no dress code, and employees could wear anything. Thereafter, Ms. Wang continued to wear the union vest at work until the Respondent issued a dress code at the end of January 2004.

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On January 29, 2004, President Su distributed a one-page document in Chinese to all employees (Solicitation/Dress Code Rules), the English translation⁷ of which reads, in pertinent part:

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To avoid interruptions of business operation, our employees are not allowed to do any promotion unrelated to the Company or distribute any paper advertisement at workplace or during work [time].⁸ Those who are

⁵ Although Mr. Wei placed the celebration in January 2004, his testimony appeared to refer to the December 12, 2003 function.

⁶ The General Counsel does not allege Group Leader Wing's comment to be coercive; however, it provides evidence of Respondent's knowledge of Mr. Wei's union activities.

⁷ The English translation is set forth as revised at the hearing by the official translator who also provided the original translation of the document.

⁸ In other parts of the Solicitation/Dress Code Rules, the Chinese character translated here as "hours" was corrected by the translator to read "time." Therefore, I have substituted the word "time" for "hours" in this sentence as well.

not Company employees are not allowed to enter the premises of the Company, including parking lot, to promote or distribute paper advertisement. (Business visits are excluded).

During work time, the time spent in engaging in or receiving promotion or distribution of paper advertisement is deemed a violation of using normal work time; break time and meal time are not included.

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I would also like your attention of the following important regulation because many colleagues have reported to the management that: some employees during work time wear jackets not printed with "Chinese Daily News" name or logo instead with names or logos of other entities, including the name or logo of Communications Workers of America (CWA). This is a violation of Company regulation.

It is your personal choice whether you choose to support or against workers union. Nevertheless, the Chinese Daily News' concern is those who come to work wearing jackets printed with non-Chinese Daily News name or logo; when they have contacts with customers or public for business, they may misrepresent their identities and cause unnecessary mistakes and fail to achieve the missions at work.

On this note, I would like to stress again the rule we have followed always: during work, those employees who have business contacts with customers or general public are not allowed to wear CWA jackets to work. This rule applies to employees including reporters, drivers, business reporters, and those who may have direct business contacts with customers or general public.

The Solicitation/Dress Code Rules were issued to employees, including Mr. Wei, who have no contact with the public, as well as to employees who meet with the public. Prior to the issuance of the Solicitation/Dress Code Rules, the Respondent had no dress code and no rules restricting dissemination of written materials or promotion of employee activities. Employees had regularly worn tee shirts with commercial advertising imprinted such as "ATT" and "Toshiba," and both before and after issuance of the rules, the Respondent permitted employees to distribute to fellow employees such entrepreneurial solicitations as dry cleaning offers and clothing and food sales promotions. After the Respondent issued the Solicitation/Dress Code Rules on January 29, 2004, employees no longer wore clothing with union insignia.

B. Shieh-Sheng Wei: Written Warning and Alleged Work Assignment Change

In preparing the newspapers for delivery, the packing department utilizes two large machines to bundle the newspapers in two sequential stages: bundling of retail newspapers and bundling of postal newspapers. A group of two to three employees operates each machine, both of which function nonstop during each stage. If it is necessary for an employee to leave the machine during operation, the group leader or deputy group leader momentarily replaces the absent employee.

On June 14, 2004, after the packing employees completed the initial bundling stage, one of the machines stopped operating. When Group Leader Wing inquired why,

deputy group leader Kao told him that one of the operators, Hong Nian Gao (Hong Gao) had left to go to the restroom. Group Leader Wing took the place of Hong Gao, until the missing employee returned, whereupon he returned to his office. From his office, Group Leader Wing saw Hong Gao arguing with Deputy Group Leader Kao and returned to the bundling area where he learned that Hong Gao was upset with Deputy Group Leader Kao because he believed the deputy group leader had reported his absence from the machine. To resolve the problem, Group Leader Wing announced that henceforth packing employees would be permitted a five-minute period to use the restroom between the two bundling stages.

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According to Mr. Wei, the following exchange occurred: Group Leader Wing said employees would receive no other break opportunity during the bundling cycles. Mr. Wei loudly protested, saying such a rule would deprive the workers of their born human rights. Group Leader Wing in turn loudly accused Mr. Wei of scolding and cursing him. Mr. Wei denied cursing Group Leader Wing or using foul language.

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Group Leader Wing testified that Mr. Wei scolded him, saying Group Leader Wing "did not want to keep [his] face" and accusing him of staying in his office and not helping with the work. Group Leader Wing said Mr. Wei publicly humiliated him by saying "F____ your mother," in front of the other workers, to which he responded in a loud voice, "You all heard the profanity he yelled to me." In his 25 years of employment, Group Leader Wing said, he had never heard any other employee curse a supervisor. Deputy Group Leader Kao in pertinent part corroborated Group Leader Wing's testimony of the June 14, 2004 confrontation. Like Group Leader Wing, he had never before heard an employee speak to a group leader in that manner. ¹⁰

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Later on the day of the confrontation, Group Leader Wing prepared a report of the incident, which he furnished to the Respondent's Human Resources Department:

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Report of an argument

Time: June 14, 2004, 4:35 AM

Location: Inside the packing department

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Description: On that day all retail newspapers was completed by 4:35 AM, and the following procedure would be to insert postal newspapers. Some employees went to the bathroom and didn't return to the workstation when other employees started to insert the newspaper. One of them was [Hong Nian Gao] who started to argue with deputy group leader [Ching Hwa Kao] when he came back from the bathroom...In handling the argument, for the

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⁹ This idiom reflects the English equivalent of shame on you.

¹⁰ Deputy Group Leader Kao has been retired from the Respondent since January 1, 2007. As a retired employee, the former deputy group leader may reasonably be expected to have little personal interest in the outcome of this hearing, which tends to make his testimony inherently trustworthy, and I found him to be straightforward and sincere. I did not find Mr. Wei to be as reliable. In a deposition given on July 26, 2005, Mr. Wei was somewhat vague about what he said during his exchange with Group Leader Wing, testifying that he did not remember whether he had used foul language or profanity, although he denied using profanity to his supervisor. While his vagueness had disappeared by the time of the hearing, the earlier tergiversation reflects on his credibility. I credit former Deputy Group Leader Kao's account, and by logical extension, that of Group Leader Wing.

sake of fairness, I said that the policy from now would be that there is an extra 5 minutes of rest time and one may do anything one wishes...Upon that [Mr. Wei] shouted aloud saying that won't work—what if I can't go in the time you specified? I said, "That is your business, not mine." Then he was very unwilling to be receptive and said, shame on you, why don't you come out to work on collecting newspapers, instead you are inside the office. He repeated shame on you several times. Then he humiliated and insulted me in public with [four-letter] word "[f] your mother." I had given advice and warning to that employee because of his smoking during the bundling time at work, he was also required to pay attention during insert. Furthermore, at the book-giving campaign in January this year, the same employee had major complaints and disobeyed the instructions when I instructed all employees help to move the sorted and boxed books to the big truck to be transported to the freight station at China Airlines to be transported to Taiwan. This employee has already severely violated the company policies. I hereby request the upper level apply the most severe punishment that is to be put on the record one major strike of misconduct and, in the event of repeating the same, there will be no leniency and termination will be issued.

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On the day following the incident, June 15, 2004, Mr. Wei gave Group Leader Wing a letter written in Chinese, which Mr. Wei desired him to present to various managers, including President Su. The English translation of the letter, in pertinent part, is as follows:

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On June 14, department leader [Group Leader Wing] of the Packing Department made a public announcement at the workplace that the employees of the Packing Department are only allowed to go to bathroom after the retail newspapers are sent out, and the bathroom time is set for 5 minutes. If the bathroom break is not used, it is deemed to be waived. No one is allowed to use bathroom at any other time during work....It is an abuse to limit the duration and set the specific time for bathroom. Even the prisoners do not have this rule, why would the Newspaper allow it to happen?¹¹

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After reviewing Group Leader Wing's report, HR Manager Gao, who knew Mr. Wei was a union supporter, instructed Group Leader Wing to get a report of the incident from another witness. Group Leader Wing had already asked the Deputy Group Leader Kao to provide a report, which Group Leader Wing thereafter submitted to HR Manager Gao. The report, as translated in pertinent part into English, read:

Report of argument that occurred.

Time: 6/14/04 4:35 a.m.

Location: Packing Department.

Description of occurrence: On that day, when...the insertion of the retail 45

newspaper was complete..., one insert machine did not operate because [employees Hong Gao and Zhou Lan] left the location without telling anyone. At the time, the group leader did ask the whereabouts of the two employees and to make the inserting machine to operate normally, he came over to support. But unexpectedly, when [Hong Gao] came back, he

¹¹ Mr. Wei received no response to this letter.

misunderstood that I reported something to the group leader and became angry and ballistic...The group leader repeated that from that time on, there is a five minute time for break, so that hoping no one will leave the work station without notifying other people. However, at that time, [Mr. Wei] used this reason to start an argument with the group leader and started using words that is not proper and started scolding with insulting words. With the handling of this situation: on 6/15/04, [Hong Gao] voluntarily came to apologize

Group Leader Wing appended a disciplinary recommendation to Deputy Group Leader Kao's report: "The above is all true. I ask upper management to use most severe written warning, so that if there's any recurrence, the person will be terminated."

After reviewing Group Leader Wing and Deputy Group Leader Kao's reports, HR Manager Gao sought permission from President Su to issue "severe" warnings to the two employees involved. On August 17, 2004, the Respondent issued nearly identical written warnings to Hong Gao and Mr. Wei. The warning to Mr. Wei, over the signature of Group Leader Wing, read:

After reviewing the incident that took place on June 14, 2004, [y]ou are being placed on disciplinary action effective August 11, 2004. The decision to place you on disciplinary action is due to verbal misconduct and insubordination towards your supervisor. If these type of similar verbal misconduct and/or insubordination happen again, you may be consider[ed] for termination.¹³

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According to Mr. Wei, thereafter the Respondent no longer assigned him to begin work at midnight rather than 2:50 a.m. to 8:00 a.m., effectively reducing his work hours. Group Leader Wing denied reducing Mr. Wei's hours. According to the group leader, Mr. Wei was unwilling to come in early. On several occasions, Group Leader Wing testified, Mr. Wei told him he could not handle the extra hours because he was unable to sleep well. Mr. Wei also requested reduced work hours or days because of child care issues. Mr. Wei denied requesting reduced hours, testifying that only prior to the year 2000, had he requested a Sunday off every two months so he could visit a handicapped child. Mr. Wei asserted that the Respondent has continuously reduced his work hours because of his union activity since the year 2000, but Mr. Wei also admitted he told Group Leader Wing he preferred to work only two of the three weekend shifts (Friday, Saturday, and Sunday), as they involved very heavy work. Mr. Wei agreed that since 2004 part-time packing employees rarely began work at midnight and that employees who work the weekend shifts generally have more work hours than those who do not, as the heavier weekend work load generates longer shifts.

The parties introduced extensive payroll records into evidence, and both the Respondent and the General Counsel argue that the records support their respective positions. The records fail to demonstrate any clearly discernible pattern of inequality in Mr. Wei's weekly shifts as contrasted with those of other part-time packing employees that

¹² HR Manager Gao explained that the two-month gap between the incident and the warnings was a result of work distractions coupled with an overabundance of caution in issuing warnings during a period of union organization.

¹³ The warning issued to Hong Gao was identical to that issued to Mr. Wei, except that the words "verbal" and "and/or insubordination" were omitted from the second sentence.

would not be consistent with Mr. Wei's preferring to work only two of each week's three longest shifts. The records do show that following August 17, 2004, Mr. Wei did not work any midnight shifts.

C. Alleged Prohibition on Employee Discussion of Overtime

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Mr. Sun, one of the Respondent's drivers was an active union supporter, who wore the union vest to work almost daily from December 2003 to the end of January 2004. Sometime prior to February 2004, the Respondent hired several part-time newspaper delivery drivers, which limited the overtime hours available to the fulltime drivers. The fulltime drivers, including Mr. Sun signed and submitted to management a letter complaining about the reduced overtime.

In late January or early February 2004, a driver named Chen (driver Chen) discussed an overtime concern with Mr. Sun, who encouraged him to report fully all of his overtime. On February 9, 2004, Assistant Business Manager Mr. Li called Mr. Sun into his office with the Director of the Circulation Department, Bobby Hsu (Mr. Hsu) present. Mr. Li showed Mr. Sun a copy of driver Chen's timecard, saying that driver Chen had complained about overtime and had mentioned Mr. Sun's name. According to Mr. Sun, Mr. Li told him the company had to hire part-time drivers for the good of the newspaper and that he hoped in future Mr. Sun would not talk to his coworkers about overtime and rights, so that their work morale would not be affected.

Mr. Li did not testify about the conversation. Mr. Hsu denied that Mr. Li had told Mr. Sun not to talk about overtime. According to Mr. Hsu, Mr. Li told Mr. Sun he had heard rumors were circulating that the company did not pay overtime, which was untrue. According to Mr. Hsu, Mr. Li told Mr. Sun the company must and did pay overtime if overtime was worked and the Respondent did not want "these kinds of rumors just spread out." Mr. Li told Mr. Sun he could talk about anything to his coworkers but it must be based on the truth, that he could not tell untruthful things—nonsense—to employees.¹⁵

C. Deposition of Employee/Plaintiffs

On March 5, 2004, employees Ms. Wang, Yu Fang Ines Kai, and Hui Jung Pao (Employee/Plaintiffs) on behalf of themselves and all others similarly situated filed a class action complaint (Class Action Lawsuit) against the Respondent in the United States District Court of the Central District of California, for, inter alia, violations of the Fair Labor Standards Act. Represented by Mark T. Palin, of Atkinson, Andelson, Loya, Ruud & Romo, the Respondent sought to disqualify the Employee/Plaintiffs on grounds that the class action was a pretextual strategy for the true motivation of advancing the Union's organizational interest among Respondent's employees and that the Employee/Plaintiffs did not intend to act in the best interests of the class. The Respondent believed the union activities of the Employee/Plaintiffs to be relevant and material to its defense positions regarding the Employee/Plaintiffs' conflicts of interest and other improprieties.

¹⁴ Although Mr. Sun's Board affidavit stated that he wore the union vest about one day per week, he credibly testified that he had weekly worn the vest nearly every day.

¹⁵ Given the manner and demeanor of the two witnesses who testified concerning the conversation, and in light of the unexplained failure of Mr. Li to testify, I find Mr. Sun's account credible.

In the course of defending the Class Action Lawsuit, the Respondent deposed Mr. Wei, Mr. Sun, and Ms. Wang. Although only Ms. Wang was a named plaintiff in the Class Action Lawsuit, Mr. Wei and Mr. Sun were two of six employees whose declarations the Employee/Plaintiffs submitted to District Court Judge Consuelo B. Marshall in support of the

motion for class certification. See *Wang et al. v. Chinese Daily News, Inc. et al.*, 231 F.R.D. 602, 608 and 615 (C.D. Cal. 2005), app den 159 Fed Appx 750 (9th Cir. 2005). The three employees were deposed on the following dates:

June 14 and July 26, 2005 -- Mr. Wei

June 28, 2005 -- Mr. Sun

August 24, 2005 -- Ms. Wang

During the depositions of Mr. Wei, the Respondent questioned him about his role and involvement in the Union, whether he voted for the Union in the election, whether and how many union meetings he attended, and where the union meetings were held.

During the deposition of Mr. Sun, the Respondent questioned him about whether he was involved in the union organizing campaign and whether he was or considered himself to be a union shop steward.

During the deposition of Ms. Wang, the Respondent questioned her about the filing and disposition of nine unfair labor practice charges filed with the Board that alleged the Respondent's unlawful conduct toward her because of her union activities, about an employee letter presented to the chairman of the Respondent's parent company, and about a 2002 trip to Taiwan to educate Taiwanese people about the Union.

IV. Discussion

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A. Alleged Independent 8(a)(1) Violations

1. Alleged Prohibition on Employee Discussion of Overtime

The General Counsel contends the Respondent violated Section 8(a)(1) of the Act on February 9, 2004 when its assistant business manager, Mr. Li, expressing concern for employee work morale, told employee Mr. Sun not to talk to his coworkers about overtime and rights.

Employees have a protected right to discuss among themselves the terms and conditions of their employment of which overtime is one. Where, as here, the Respondent has expressly prohibited employee discussion of overtime wages and other terms and conditions of employment, the rule plainly infringes on Section 7 rights and violates the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112,115 (2004). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when Mr. Li directed Mr. Sun not to talk to coworkers about overtime and other employee rights.

2. Alleged Interrogation in the Course of Depositions

The General Counsel argues the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees Mr. Wei, Mr. Sun, and Ms. Wang during the course of depositions taken in connection with the Class Action Lawsuit.

In determining whether deposition inquiries about union activities violate the Act, the Board looks at whether the questioning is relevant and if so, whether it has an illegal objective. If the questioning is found to be "both relevant *and* lacking an illegal objective, the analysis must then consider whether the Respondent's need for the information outweighs the employees' rights under Section 7 of the Act." *Guess?, Inc.*, 339 NLRB 432, 434 (2003); see also *Allied Mechanical*, 349 NLRB No. 100, FN 1 (2007).

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When the Respondent took their depositions, Mr. Wei, Mr. Sun, and Ms. Wang were long-standing conspicuous union adherents who openly espoused the Class Action Lawsuit, Ms. Wang as a plaintiff and Mr. Wei and Mr. Sun as supportive declarants. The Respondent argued, albeit unsuccessfully, that the Employee/Plaintiffs should be disqualified from bringing the Class Action Lawsuit because their true motivation was to advance the Union's organizational interests and because they did not intend to act in the best interests of the class. In order to develop its position, the Respondent needed to establish the union advocacy of the Employee/Plaintiffs and the supportive declarants. Inquiry into the individuals' union support was, therefore, relevant to the Respondent's defense. As to whether the Respondent had an illegal objective in asking the deponents about their union activities, the General Counsel has presented no evidence aside from the Respondent's general union animus. The General Counsel has cited no authority for the proposition that the existence of union animus alone demonstrates an illegal objective. Where, as here, the interrogation was relevant and gave no impression that retaliatory action might ensue, I cannot find an illegal objective. Therefore, as directed by the Board, further analysis must balance the Respondent's need for the information against the employees' rights under Section 7 of the Act.

In weighing employer need against employee rights, the Board's decisional stance on interrogation is instructive. In the Board's view, an employer's questioning of employees about their union sentiments is not a per se violation of Section 8(a)(1) of the Act, particularly where employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain. coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. Rossmore House, 269 NLRB 1176, 1177-1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). The Board considers criteria referred to as the "Bourne factors," 16 which examine whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. The Board has not considered employer interrogation to be coercive in the following circumstances: questioning of open and active union supporter about prounion mailgram he sent to employer. Rossmore House, supra; asking employee with a union-embossed hard hat if he supported the union, Tradesmen International, Inc., 351 NLRB No. 37 (2007); asking about the union membership of an applicant whose membership was already obvious, Boydston Electric, 331 NLRB 1450 FN 5 (2000); and inquiring into whether misconduct had occurred during a discussion about the union, Bridgestone Firestone South Carolina, 350 NLRB No. 52 (2007). But see Allied Mechanical, supra, where deposition questions irrelevant to the civil action inquired into confidential, protected conduct, and Guess? Inc., supra, slip op. 6, where deposition questions about the identities of other employees who attended union meetings violated Section 8(a)(1) of the Act.

¹⁶ Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964).

Here the union advocacy of the three deponents was open and longstanding; the employees had confronted the Respondent in a class action lawsuit certain, if not calculated, to attract intra-company attention. None of the deponents could reasonably have expected that he/she could remain anonymous in the matter, and the deposition questions posed by the Respondent's attorney could not have been intended to expose any unknown or confidential information. The Respondent's questions focused on the deponents' union activities, not those of others. 17 The questions were clearly intended to create a legal record, and neither the deposition questions nor their context suggests any element of coercion or interference with protected rights. Upon applying the Board's balancing test, I find the confidentiality interests of the three deponents were not substantial inasmuch as they had, long prior to the depositions, overtly revealed their union sentiments to the Respondent and fellow employees and signified, through their previous union activities as well as their participation in the lawsuit, their intentions of championing employee rights. On the other hand, I find the Respondent's interest in obtaining the information was significant, as the union partisanship of the three employees was a basic element of its preliminary defense to the lawsuit. The Respondent's interest therefore outweighed the employees' confidentiality interest under Section 7 of the Act. Accordingly, I find the Respondent did not violate Section 8(a)(1) of the Act when Mr. Palin deposed Mr. Wei, Mr. Sun, and Ms. Wang in connection with the Class Action Lawsuit.

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B. Alleged 8(a)(1) and (3) Violations

 Promulgation and Maintenance of Overbroad Solicitation/Distribution Rule and Discriminatory Dress Code

An employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in non-work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945): *Our Way, Inc.*, 268 NLRB 394 (1983).

In its Solicitation/Dress Code Rules, the Respondent informed its employees that they were prohibited from engaging in any promotion unrelated to the Company or from distributing "any paper advertisement <u>at workplace or during work [time]</u> (emphasis added)." This phrase in the Solicitation/Dress Code Rules is susceptible to a reasonable construction that solicitation on company premises, at any time, is prohibited.¹⁸ The

¹⁷ Although the Respondent's counsel asked Mr. Wei where union meetings were held, it is clear those questions were intended to elicit information as to whether the meetings were held at the homes of two of the Employee/Plaintiffs, Mr. Pao and Ms. Wang. As such the questions related to the union advocacy of the lawsuit instigators.

¹⁸ Given the over breadth of the "workplace" restriction, it is unnecessary to address the presumption the Board attaches to the words "work time." See *Our Way, Inc.*, 268 NLRB 394, 394-395 (1983). I note however, that in circumstances where nearly all employees speak the Mandarin language and where the official translator struggled with the meaning of the Chinese character ultimately translated as "time," the juxtaposition of the words "workplace or work time" was likely to restrain employees from engaging in protected solicitation/distribution even during nonwork time. In this context, therefore, the words "work time" cannot be presumptively valid.

Respondent's rule relative to solicitation/distribution is, therefore, unlawful on its face. Since the rule is presumptively unlawful, the Respondent has the burden of showing that it communicated or applied the rule in such a way as to convey clearly its intent to permit solicitation at the workplace during break times or other nonwork periods. *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993). The Respondent has not met that burden. The evidence shows that following its solicitation/distribution ban, the Respondent neither explicated nor retreated from its published rules. Since the Respondent's ban was overbroad, I find the Respondent violated Section 8(a)(1) of the Act by promulgating its Solicitation/Dress Code Rules. There is, however, no evidence of discriminatory enforcement. See *Federated Logistics and Operations*, 340 NLRB 255 (2003). I shall, therefore, dismiss the 8(a)(3) allegations of Complaint paragraph 6(b).

The Respondent also implemented a dress code by its Solicitation/Dress Code Rules. Employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. For purposes of proving an 8(a)(1) violation, the General Counsel need not show that Respondent's insignia prohibition was unlawfully motivated; "rather, the test is whether an employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act." *St. Luke's Hospital*, 314 NLRB 434, Fn. 4 (1994). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E&L Transport Co.*, 331 NLRB 640. FN 3 (2000).

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In its Solicitation/Dress Code Rules, the Respondent purports to direct that employees with public contacts may not wear "jackets printed with non-Chinese Daily News name or logo." However, on its face, the dress restriction is ambiguous as to whom, when, and where it would apply. Introductorily, the notice states, "[S]ome employees during work time wear jackets not printed with 'Chinese Daily News' name or logo instead with names or logos of other entities, including the name or logo of Communications Workers of America (CWA)." This asserted violation of company policy encompasses all employees in the workplace and can be construed to apply to employees who have no public contact. In the next paragraph, the notice explains, "[W]hen [employees wearing non-company identifying clothing] have contacts with customers or public for business, they may misrepresent their identities and cause unnecessary mistakes and fail to achieve the missions at work," but the brief explanation does not make it clear that only employees with public contact are prohibited from coming to work wearing clothing with non-company insignia. Finally, in repeating the rule in the penultimate paragraph of the notice, the Respondent stresses that "during work, those employees who have business contacts with customers or general public are not allowed to wear CWA jackets to work (emphasis added)." Although this sentence facially restricts employees with customer contact, it also specifically targets union insignia for prohibition, which signals a discriminatory purpose having little to do with avoiding identity confusion. The Respondent's pointed bias against union identifying clothing is likely to restrain all employees who are apt to infer that the prohibition has more to do with union animus than with public image. Taken as a whole, the dress code is so ambiguously worded that employees may reasonably construe it as prohibiting all employees from wearing union-identifying clothing at the workplace. The Solicitation/Dress Code Rules are therefore overbroad.

The Respondent has presented no evidence that it clearly communicated to employees, by application of the rules or otherwise, its intent to apply the clothing restrictions in a lawful manner. Moreover, the Respondent failed to establish any special circumstances to justify the rule. The Respondent's general concern about potential misrepresentation of employee identity by the wearing of non-company enscripted clothing fails to meet "the Respondent's burden of establishing the presence of 'special circumstances' to justify the rule's broad proscriptions." *Albertsons, Inc.,* 351 NLRB No. 21, slip op. 5 (2007). Accordingly, I find Respondent violated Section 8(a)(1) of the Act by issuing a dress code that over broadly restricted employees' wearing of union insignia.

In determining whether the Solicitation/Dress Code Rules also violate Section 8(a)(3) of the Act, as the General Counsel alleges, discriminatory intent must be shown. Allegations that turn on employer motivation must be analyzed under Wright Line. 19 Under that standard, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. United Rentals, Inc., 350 NLRB No. 76, slip op. 1 (2007). As to the 8(a)(3) allegation relating to the Respondent's promulgation and maintenance of a dress-code rule prohibiting the wearing of clothing bearing union insignia, the General Counsel has met his initial burden under Wright Line. The Board's decision in Chinese Daily News, supra, which found the Respondent had committed multiple violations of the Act demonstrates the company's union animus. Moreover, in December 2003, the Respondent demonstrated its animosity toward its employees' wearing of union-supportive apparel when supervisor Ms. Lee twice criticized Ms. Wang for wearing the union vest, saying, on the first occasion, "We don't have a union." Further, the Solicitation/Dress Code Rules on their face reveal the underlying union animus by specifically and selectively targeting "CWA jackets" in the penultimate paragraph. The burden of proof therefore shifts to the Respondent to demonstrate a nondiscriminatory basis for establishing a dress code that restricted the wearing of clothing bearing union insignia. Respondent has failed to show that it would have issued its dress code rules even in the absence of its employees' union activity. I therefore find the Respondent violated Section 8(a)(3) by promulgating and maintaining a discriminatory dress code in February 2004.

2. Shieh-Sheng Wei: Written Warning and Alleged Work Assignment Change

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Paragraph 8 of the Complaint alleges the Respondent unlawfully issued a written warning to Mr. Wei on August 17, 2004. The question of whether Respondent violated Section 8(a) (1) and (3) of the Act by issuing Mr. Wei a written warning rests on its motivation. Therefore, the analytical framework of *Wright Line*, supra, must be applied.²⁰

¹⁹ 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. Denied 455 U.S. 989 (1982).

²⁰ The General Counsel also proffers the and/or argument that Mr. Wei's protest of the five-minute limitation constituted protected concerted activity and that retaliatory discipline for his protest violates Section 8(a)(1) of the Act. While agreeing with both of the General Counsel's legal propositions, I find it unnecessary to make an analytical distinction.

The General Counsel must first persuade, by a preponderance of the evidence, that Mr. Wei's protected conduct was a motivating factor in any reduction of work hours and in the issuance of the warning. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; *Donaldson Bros, Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon and Its Subsidiary Telesector Resources*, 350 NLRB No. 53, 2007; *Group Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the elements are clearly met as to Mr. Wei, of whose open union support the Respondent was aware and toward which, as noted above, the Respondent had general animus. Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference"²¹ that Mr. Wei's protected activity was a motivating factor in the Respondent's post June 14, 2004 alteration of Mr. Wei's work hours²² and its decision to issue him a warning notice on August 17, 2004. The burden therefore shifts to the Respondent to demonstrate that it would have issued the August 17 warning notice to Mr. Wei even in the absence of his union activity.

The Respondent contends that on June 14, 2004 Mr. Wei engaged in verbal misconduct and insubordination toward his supervisor, Group Leader Wing, for which the Respondent issued him a warning notice dated August 17, 2004. Credited testimony establishes that on June 14, 2004, in the course of a dispute over restroom breaks, Mr. Wei scolded Group Leader Wing in front of the other employees, saying Group Leader Wing should be ashamed, and profanely insulting the group leader's mother. Employers may discipline employees for profane language, provided such discipline is administered in a nondiscriminatory fashion. *Bridgestone Firestone South Carolina*, 350 NLRB No. 52, slip op 7 (2007) [citations omitted].

The Respondent maintains Mr. Wei's behavior was so egregious that his discipline was justified. The issue, however, is not whether the Respondent acted reasonably in issuing Mr. Wei a written warning, but whether the Respondent would have taken the same action, even if Mr. Wei were not an active union supporter and/or had not engaged in the protected activity of protesting the restroom break. See *Wal-Mart Stores, Inc.*, 351 NLRB No. 17 (2007). "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of protected activity." *Weldon, Williams & Lick, Inc.*, 348 NLRB No. 45, slip op. at 5 (2006).²³ In the managerial communications regarding the discipline, no discriminatory motive can be discerned. No evidence was adduced of disparate treatment, as no evidence was presented that any employee had ever before used profanity to a supervisor. Counsel for the General Counsel argues that the delay between incident and discipline warrants an inference of unlawful intent. While it is true that two

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²¹ Wright Line, supra at 1089.

²² The General Counsel alleges in the Complaint that sometime after the June 14, 2004 incident that gave rise to Mr. Wei's written warning, the Respondent refused to give Mr. Wei shift rotations and assignments, resulting in loss of overtime pay. A complicated dispute exists as to whether the Respondent manipulated Mr. Wei's work hours to his disadvantage or merely complied with his scheduling requests. In light of my findings regarding the discipline imposed on Mr. Wei, it is unnecessary to resolve those issues.

²³ Quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), pet rev den 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

months elapsed before Mr. Wei received a written warning for his misconduct, the Respondent explained the lag time as resulting from press of business and hyper-caution. a not-unreasonable response to the Respondent's ongoing labor problems. I cannot therefore infer improper motive from the timing of the warning. Counsel for the General Counsel further argues that HR Manager Gao's failure to interview Mr. Wei before imposing discipline reveals the Respondent's unlawful motive. Although HR Manager Gao did not ask for a statement from any employee witness to the incident except deputy group leader Kao, there is no evidence that Respondent sought to shape or distort the investigation or that there was not genuine fact gathering.²⁴ The Board declines to tell an employer how to investigate allegations of employee misconduct, and failure to investigate in a particular manner before imposing discipline does not establish an unlawful motive. Chartwells, Compass Group, USA, Inc., 342 NLRB 1155, 1158 (2004). I find the Respondent has met its shifted burden of proof as to the discipline imposed on Mr. Wei.

Paragraph 7 of the Complaint alleges that since late June or early July 2004 the 15 Respondent discriminatorily refused to give Mr. Wei shift rotations and shift assignments, which resulted in loss of overtime pay. Even assuming the Respondent disregarded Mr. Wei's shift preferences and assigned him work hours that resulted in lost overtime pay, the evidence does not establish that the Respondent had an improper motive in doing so. If involuntary alteration in Mr. Wei's hours occurred, any change would 20 presumably be linked, as Counsel for the General Counsel argues, to his restroom-break confrontation with Group Leader Wing. I have determined that the Respondent did not unlawfully discipline Mr. Wei for his conduct during that confrontation, and it follows that the Respondent did not unlawfully alter Mr. Wei's hours or refuse him shift assignments. Accordingly, I find the Respondent did not violate Sections 8(a)(1) and/or (3) of the Act by 25 its discipline of or shift assignments to Mr. Wei. I shall, therefore, dismiss the complaint allegations of paragraphs 7 and 8.

Conclusions of Law

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- 1. The Respondent, Chinese Daily News is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union, Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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3. Beginning on January 29, 2004, the Respondent violated Section 8(a)(3) and (1) of the Act by promulgating and maintaining a dress code rule prohibiting the wearing of union insignia.

4. Beginning on January 29, 2004, the Respondent violated Section 8(a)(1) of the Act by 40

- promulgating and maintaining a rule prohibiting employees from engaging in protected solicitation/distribution during nonwork time and in nonwork areas. 5. In February 2004, the Respondent violated Section 8(a)(1) of the Act by directing an
- employee to stop talking about terms and conditions of employment. 6. The unfair labor practices set forth above affect commerce within the meaning of

Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

²⁴ Though unsolicited, Mr. Wei provided management with his statement of what had occurred.

Remedy

Having found the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

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ORDER

The Respondent, Chinese Daily News, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Promulgating and maintaining a dress code rule unlawfully prohibiting the wearing of union insignia.
- (b) Promulgating and maintaining a rule prohibiting employees from engaging in protected solicitation/distribution during nonwork time and in nonwork areas.
- (c) Directing any employee to stop talking about terms and conditions of employment.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facilities in Monterey Park, California, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.²⁷ Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

²⁷ The notices are to be posted in the following languages: English and Mandarin.

gone out of business or closed the facility involved in these proceedings. Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 2004. (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region 5 attesting to the steps that Respondent has taken to comply. IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found. 10 Dated: Washington, D.C. December 26, 2007 Lua V. Backe 15 Lana H. Parke Administrative Law Judge 20 25 30 35 40 45

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly, **WE WILL NOT** announce and/or maintain a dress code rule that unlawfully prohibits the wearing of union insignia.

WE WILL NOT announce and/or maintain a rule prohibiting employees from engaging in union or other protected solicitation or distribution during nonwork time and in nonwork areas. **WE WILL NOT** tell any employee not to talk with other employees about terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL rescind our January 29, 2004 dress-code and no-solicitation/no-distribution rules.

	_	Chinese Daily N	News
		(Employer)
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor Los Angeles, California 90017-5449 Hours: 8:30 a.m. to 5 p.m. 213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.